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No. 744

IN THE

Supreme Court of the United States

October Term, 1945

MICHAEL SALZMAN,

Petitioner,

—v—

LONDON COAT OF BOSTON, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

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No.

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—v—

LONDON COAT OF BOSTON, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT.

To the Honorables, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Michael Salzman, prays that a writ of certiorari be issued by this Court to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered in the above entitled cause on July 24, 1946, affirming in all respects, except as to an award of costs to the respondent, a judgment of the United States District Court for the District of Massachusetts, September 25, 1945, in favor of the respondent, and further to review the judgment of the United States Circuit Court of Appeals for the First Circuit entered September 4, 1946 denying Petitioner's petition for rehearing and the alternative motion to remand the case to the United States District Court based upon newly discovered evidence.

The Questions Presented.

The questions in this case arise out of an action brought in the District Court by the Petitioner, Michael Salzman, a war veteran, against his former employer, the Respondent, London Coat of Boston, Inc., to compel the Respondent to reemploy him to recover damages for the failure of the Respondent to reemploy him and, generally to enforce his rights under the Selective Training and Service Act of 1940, as amended, 58 Stat. 798, 50 U. S. C. A. War Appendix, Section 308 (a), (b), (c), (e).

Before entering the military service in July 1943, the Petitioner had been employed by the Respondent as a salesman on a commission basis under a written contract of employment dated July 28, 1942 (Pltf's Ex. 1—R. 39; R. 140; Par. 5 of Pet's. Comp.—R. 2; Par. 5 of Respt's Ans.—7).

The questions presented in this case are as follows:

> Having in mind in particular the Petitioner's written contract of employment which did not say that Petitioner's position was a temporary one or that Petitioner was a military substitute, on a temporary basis, for one Milton Winick;

1. Was Petitioner's position, under his written contract, other than a temporary position within the meaning of the Act?

2. Could the District Court go outside Salzman's written contract of employment to determine whether his position was other than a temporary one?

3. Did the District Court err in admitting any evidence relating to Milton Winick or any evidence of alleged conversations, held prior to the date of the execution of Petitioner's written contract, between Petitioner and Respond-

ent's officers, which conversations for the most part related to Milton Winick and were offered by Respondent, together with the other evidence relating to Winick, to show that Petitioner's and Winick's jobs were the same, that Winick had the job first, that Petitioner merely took Winick's job pending the latter's return from military service and, hence, that Petitioner's job was a temporary one?

4. Did the District Court err in admitting an alleged written contract of employment dated February 2, 1942 (Petitioner's contract was dated July 28, 1942) between Respondent and Winick when said contract was offered in evidence by Respondent thru its treasurer, where the District Court had already previously excluded the same contract when it was first offered in evidence by the Respondent thru its president, said exclusion having been based upon the fact that in answers to Petitioner's interrogatories addressed to Respondent, the president of the Respondent stated under oath that Winick's contract of employment was oral, and upon the further fact that the president testified, and the District Court ruled, that when the president signed the answers he knew that Winick's contract of employment was in writing?

5. In the face of the Petitioner's written contract of employment which made no mention of Winick, did the District Court err in admitting the alleged written contract of employment between Respondent and Winick, which contract was seen for the first time by Petitioner at the trial in the District Court?

6. Was the District Court warranted in finding that Petitioner was a temporary employee not entitled to the benefits of the Act?

7. Did the District Court err in denying Petitioner's requests for rulings, said denial being inferred from the District Court's failure to act on them?

8. Was the Petitioner entitled to a jury trial, and if so did the Petitioner unconditionally and irrevocably waive his right to a jury trial?

9. Did the Circuit Court of Appeals err in affirming the judgment of the District Court and in denying the Petitioner's petition for a rehearing and alternative motion to remand based upon newly discovered evidence?

Statutes Involved.

Selective Training and Service Act of 1940, as amended, 58 Stat. 798, 50 U. S. C. A. War Appendix.

The material sections of the Act as they relate to this case are as follows:

Section 308 (a)

> Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under Section 3 (b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained * * *.

Section 308 (b)

> In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the em-

ploy of any employer and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service * * *.

(B) If such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so; * * *.

Section 308 (c)

Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year after such restoration.

Section 308 (e)

In case any private employer fails or refuses to comply with the provisions of subsection (b) or subsection (c), the district court of the United States for the district in which such private employer maintains a place of business shall have power, upon the filing of

a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions to specifically require such employer to comply with such provisions, and, as an incident thereto, to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. The court shall order a speedy hearing in any such case and shall advance it on the calendar. Upon application to the United States district attorney or comparable official for the district in which such private employer maintains a place of business, by any person claiming to be entitled to the benefits of such provisions, such United States district attorney or official, if reasonably satisfied that the person so applying is entitled to such benefits, shall appear and act as attorney for such person in the amicable adjustment of the claim or in the filing of any motion, petition, or other appropriate pleading and the prosecution thereof to specifically require such employer to comply with such provisions: Provided, That no fees or court costs shall be taxed against the person so applying for such benefits.

Official Handbook of Selective Service

Part III—Chapter 3. 303.3—Persons Who Left Same Job Assignment.—The fact that several veterans left the same job assignment in an employer's establishment to enter the armed forces is not determinative of whether the "position in the employ of" the employer which any of such veterans left was temporary or other than temporary. It is the character of the employment relationship that should govern and not merely the particular assignment being carried out at the time of entry into active military service.

STATEMENT

Facts and Pleadings.

The facts are undisputed that in June 1942, the Respondent, a Massachusetts corporation with a principal place of business in Boston, employed the Petitioner, a New York resident, as a salesman on a commission basis in its New York office under an oral contract of employment; that on July 28, 1942, Petitioner and Respondent executed a written contract of employment (R. 39; R. 140—Exhibit 1); that while employed under said written contract, Petitioner was inducted into the United States Army on July 14, 1943 and was honorably discharged November 16, 1944 (R. 2—Complaint, paragraphs 2, 3, 4, 5; R. 7—Respondent's answer, paragraphs 2, 3, 4, 5). Petitioner gave up a law practice in New York that netted him $3,000 a year to take the job with the Respondent (R. 48—Q.66; R. 54—Q.118). Respondent knew that Petitioner was giving up his law practice to take the job (R. 118—Gneses, XQ. 62). Stanley Swartz, president, and Hyman Gneses, treasurer, held joint ownership and control of the Respondent (R. 79—Q. 20 thru 22; R. 112—Q. 4).

On November 20, 1944, four days after his honorable discharge, Petitioner requested Respondent to restore him to his former position (R. 2, 3—Complaint, paragraph 7; R. 7—Respondent's answer, paragraph 7). Petitioner testified that he was qualified for such reemployment (R. 44—Q. 35). Respondent's counsel, Mr. Proctor, stated in open Court that "no question is raised as to his (Petitioner's) efficiency" (R. 101). Respondent refused to restore Petitioner to his former position (R. 44—Salzman, Q. 33; R. 108—Swartz, XQ. 236).

The nub of the defense in this case, and the sole excuse pleaded by Respondent for refusing to reemploy Petitioner is found in paragraphs 8 and 9 of Respondent's answer, as follows:

(R. 7)

"8. The respondent denies the allegations of paragraph 8 and further answering says that on November 24, 1944, it sent the petitioner a telegram, a copy of which is hereto annexed and marked Exhibit A (set forth in full in District Court's opinion, ~~infra, p. 22~~ R. 30), that the Petitioner's contract of employment, a copy of which is attached to his petition and marked Exhibit A has been terminated and was no longer in force and effect; that the respondent was under no obligation to reemploy the Petitioner because its circumstances had so changed as to make it impossible or unreasonable to do so, and the respondent was otherwise excused from reemploying the Petitioner by reason of the facts stated in the following paragraph

(R. 8)

"9. Further answering the respondent says that prior to the employment of the petitioner the services for which he was employed under the written contract aforesaid had been performed by one Milton Winick who, prior to the employment of the Petitioner, had been inducted into the Armed Forces of the United States of America under the aforesaid Selective Training and Service Act, who had been honorably discharged therefrom prior to the date that the Petitioner received his honorable discharge and who had in accordance with the provisions of said Selective Training and Service Act been reemployed by the Respondent so that on the date that the Petitioner received his honorable discharge, November 16, 1944, said position was no longer open, having been filled by a person having a prior right thereto under the Selective Training and Service Act. Notwithstanding the aforesaid facts

it offered to employ the Petitioner, as evidenced by the aforesaid telegram, a copy of which is hereto attached marked A, which offer the Petitioner refused."

Respondent's answer does not allege specifically that Petitioner was employed, or that Petitioner was told or had knowledge that he was employed, in a temporary position or to take the place of Winick pending the latter's return from service in the Army. Respondent's answer does not specifically allege that Winick was an employee of Respondent when he entered the service, nor that Winick was an employee under a written contract of employment.

There is no mention of Winick in Petitioner's written contract of employment. Nor does that contract say that Petitioner's employment was temporary, or that it was temporary pending Winick's return from service.

Petitioner's contract of employment was drawn by Respondent (R. 40—Q. 9; R. 121—XQ. 90), and reads as follows (R. 39; R. 140):

"This agreement made at Boston, Massachusetts, this twenty-eighth day of July, 1942 between the London Coat Co., a corporation, hereinafter referred to as the party of the first part and Michael Salzman hereinafter referred to as party of the second part, witnesseth, that, the party of the first part agrees to employ the party of the second part as its salesman under the following terms and conditions.

"1:—The party of the first part agrees to pay the party of the second part a commission of see below % on the net proceeds of all orders obtained by the party of the second part which the party of the first part approves and ships.

"2:—The party of the first part agrees to supply and entrust to the party of the second part samples and such stocks of merchandise as in its judgment will be necessary for the second party's use, and title to such merchandise shall always remain in the party of the first part unless transferred in writing by the party of the first part, and shall be recallable in whole or in part by the party of the first part on demand.

"3:—The party of the second part shall be allowed a weekly drawing account of $50.00 dollars per week, which shall be charged to the second party against his commission account. This weekly drawing account is subject to revision either higher or lower from time to time whenever deemed necessary.

"4:—The territory alloted to the party of the second part by the party of the first part is New York City with the exception of such reservations as are enumerated in this agreement. The party of the second part is also allowed to cover actively and receive commission from the cities of Philadelphia, Washington, and Baltimore providing he covers them actively to the satisfaction of the first party.

"5:—The construction and interpretation of this contract shall be governed by the Laws of the Commonwealth of Massachusetts.

"6:—Either party of the first part does not desire the salesman to obtain orders from concerns classified in the trade as raincoat jobbers, wholesalers, or manufacturers. From time to time the salesman will be notified as to what concerns are to be so considered, and after such notice no commission is to be allowed to the salesman for orders obtained from such concerns whether or not shipped by the party of the first part.

"8:—It is hereby agreed that this writing constitutes and expresses the whole agreement of the parties with reference to employment and compensation, and that no change in this agreement shall be claimed or recognized unless evidenced by a writing signed by the party to be charged thereby.

London Coat Co., Inc.
By Stanley B. Swartz.

"1½ commission on Sears, Roebuck and other mail order houses and chain stores but only such other mail order houses and chain stores as we may assign to you by letter from time to time. No commission shall be paid on Sears, Roebuck business already in our possession or reorders on same during the same period of time. Commission on Sears is to start with all new business booked. 4% commission on all retail accounts at regular prices. 2% commission on retail accounts at cut prices. 2% on jobbers.

"Any accounts not covered by the above, commissions to be agreed upon by the party of the first part and the party of the second part."

Petitioner testified that under this contract his employment was terminable at the will of either party (R. 39). However, Petitioner also testified that there was a general practice in the trade in reference to such a contract (R. 39). The substance of this general practice was that the duration of the employment was really conditioned upon the satisfactory performance of the salesman (R. 39—Q. 8; Compare similar language in the contract, section 4, p. 10, *supra*).

At the trial in the District Court, the Petitioner objected to the admission of any evidence relating to Milton Winick (R. 46, 50, 51). During the trial, the District Court said in reference to the job of Petitioner and the job of Winick:

"Let us get down to the fact whether these jobs were the same" (R. 100).

On cross examination, Petitioner testified that at a second conference held in connection with his initial employment in June 1942, he heard of Winick for the first time (R. 48—XQ. 66); that Petitioner learned at that time that he was filling a position formerly held by Winick (R. 46—XQ. 48); that Petitioner was told by Swartz or Gneses at this conference that Winick had previously worked for Respondent for two years on a part time basis; that Winick was then in the Army (R. 48—XQ. 66); that Petitioner, thereupon, told Swartz and Gneses that he would not take a temporary job; that Swartz and Gneses agreed that Winick would have a job when he got out of the Army; that Petitioner was told that he was not taking Winick's job and that Petitioner's job would not be jeopardized by Winick's return (R. 48, 49—XQ. 68; to the same effect, see Petitioner's redirect examination—R. 54 to 56—Q. 117 to 126); that shortly after he was employed, Petitioner met Winick in Respondent's office (R. 47—XQ. 56), and Winick was introduced as the man who had previously held the job (R. 47, 48—XQ. 63, 64).

Mr. Swartz testified that the discussion about Winick at the second conference took place after the Petitioner had been hired (R. 88—Q. 71; R. 105—XQ. 209, 210).

Mr. Gneses testified that the discussion about Winick at the second conference took place only after Winick had entered the room (R. 118—XQ. 57); that he told his lawyer everything that had happened at that conference and asked his lawyer to draw the Petitioner's contract of employment (R. 121—XQ. 93), and his lawyer drew the contract (R. 121—XQ. 90).

Winick testified that his business relations with Respondent began in May 1940; that at that time, he was a part-

ner in the Sherman Company, a sales agency that handled Respondent's products among those of other concerns (R. 60—Q. 6 to 12). A partnership certificate for Winick's partnership was filed with the records of the City of New York (R. 65—XQ. 45; R. 66—XQ. 49; R. 146, Exhibit 4). The date of filing was March 7, 1940 (R. 148, Exhibit 4). Winick further testified that the partnership certificate was still on file and that there was no record of any change (R. 66—XQ. 47, 48); that in February 1942 he became personally employed by the Respondent under a written contract of employment dated February 2, 1942 (R. 61—Q. 15 to 18; R. 113; R. 153, Exhibit C); that from May 1940 to May 1941 he averaged, with two exceptions, $25 a month on Respondent's commissions (R 67—XQ. 62); that from May 1941 to February 1942, he averaged, with one exception, less than $150 a month (R. 67—XQ. 63); that from February 1942 thru May 1942, he averaged less than $200 a month (R. 67—XQ. 69); that following his discharge from the Army, he went to work for the Respondent on a salary basis of $60 a week (R. 72—XQ. 120, 121).

There was no evidence that Winick was on Respondent's books as an employee, or that he paid social security for the years 1940, 1941, or 1942.

Petitioner's net income from commissions while employed by Respondent was $7,200 for the seven months prior to his induction (R. 44—Q. 36), into the Army.

During Petitioner's employment and after his induction, Petitioner exchanged hundreds of letters with Respondent and in no instance was Winick ever mentioned. Nor was Petitioner ever told in these letters that his job was temporary (R. 53, 54—Salzman, Q. 105 to 111; R. 100—Swartz, XQ. 163 to 167; R. 13—Plaintiff's interrogatory 18; R. 20—Defendant's answer no. 18).

Winick was discharged from the Army on August 23, 1943 (R. 65—Q. 37), and he went to work for Respondent right

after Labor Day in September 1943 (R. 65—Q. 38). However, on July 22, 1943, Respondent wrote a letter to Petitioner (R. 57—Q. 135; R. 145, Exhibit 3) and there was no mention of Winick. The material sentences in that letter are as follows:

* * * * *

* * * "We plan on doing absolutely nothing about securing anyone for the New York Office until we are definitely sure of what is going to happen to you.

* * * "In the second place, should you be inducted and stay in the Army for the duration, you have our assurance that upon your return you will have our every consideration".

Following his discharge from the Army, Winick went to work for Respondent in September 1943, right after Labor Day (R. 65—Q. 38). According to Respondent, Winick was still on the job, *more than twelve months later,* on November 20, 1944 when Petitioner requested reemployment (R. 92—Swartz, Q. 94; R. 93—Q. 100; R. 94—Q. 94; R. 50—XQ. 80; R. 153—Exhibit B; R. 119—Gneses, XQ. 70, 71). Section 308 (c) of the Act says that the reemployed veteran "shall not be discharged from such position without cause within one year after such restoration" (*supra*, p. ~~10~~ 5).

When Petitioner was discharged from the Army, November 16, 1944, he telephoned from New York to Swartz in Boston that he was out of the Army and ready to return to work; and Petitioner was then asked to come to Boston (R. 41, 42—Salzman, Q. 26, 27; R. 110—Swartz, XQ. 256). Swartz testified that he had previously asked Petitioner to let him know when he got out of the Army (R. 110—XQ. 25); that he naturally expected Salzman to come back to work for Respondent (R. 110—XQ. 251 to 255); that when he asked Petitioner to do this, he did not tell Petitioner then

that it was only on a temporary basis (R. 110—XQ. 255).

Winick testified that he had known since December 1944 about Petitioner's request for reemployment (R. 69—XQ. 81); that from that time until the trial, he had seen both Swartz and Gneses practically every other week in New York (R. 70—XQ. 100, 101), and that during the same period, he had seen Petitioner "quite a few times" in Respondent's New York Office (R. 78—XQ. 189 thru 194). There was no evidence that during this period Winick ever disputed Petitioner's right to reemployment or that Petitioner was ever told that his job was temporary or that he had taken Winick's job.

Petitioner's territory under his written contract of employment was New York City, Philadelphia, Baltimore and Washington (R. 140, Exhibit 1, paragraph 4). Winick testified that under his written contract, only New York City was his territory (R. 74—XQ. 150; R. 154—Exhibit C, paragraph 4). Winick never received commissions on sales in the territory of Philadelphia, Baltimore and Washington (R. 78—XQ. 188). Since Winick's discharge from the Army, and at the time Petitioner requested reemployment, Respondent has had another salesman, one Feigenbaum, for these three Cities (R. 75—Winick, XQ. 154, 155; R. 132—Dave Salzman, Q. 51, 52; XQ. 53).

As to Winick, the Respondent stated in answer no. 15 to Petitioner's interrogatories that Winick was never in complete charge of the Respondent's New York office as far as personnel, purchasing and sales were concerned (R. 16; R. 12). However, as to Salzman, the Respondent wrote a letter to the United States Army stating that Petitioner did have complete charge of Respondent's New York office as far as personnel, purchasing and sales were concerned (R. 97—Swartz, XQ. 136 thru 138; R. 97—XQ. 138; R. 150, Exhibit 5).

On March 29, 1945, Petitioner filed interrogatories addressed to Respondent, to be answered under oath by its president Swartz (R. 11). Interrogatory #6 and Respondent's answer were as follows:

Interrogatory 6. Was Milton Winick's employment oral or in writing (R. 11)?

Answer 6. Oral (R. 14).

At the trial in the District Court, the Respondent offered in evidence a written contract of employment with Winick (R. 61—Winick Q. 18). Petitioner objected. At first the District Court admitted this contract but then excluded it when Petitioner referred the Court to interrogatory 6 and the answer (R. 61—Q. 18). In excluding this contract, the District Court said to Respondent's counsel:

> "No, the plaintiff prepares his case on the basis of what you answer to interrogatories. It is unfair. I will deny that" (R. 61—bottom of page).

In open Court, defense counsel thereupon offered to show that Swartz had forgotten about the written contract with Winick when he signed the answers to the interrogatories (R. 62—top of page). However, Swartz then testified that when he signed the answers he knew that Winick's contract was in writing (R. 62—Q. 5), and that there was a duplicate original (R. 63—Q. 11). Defense counsel then told the Court that he had not told Petitioner's counsel about the written contract. The District Court again excluded Winick's contract (R. 63—Q. 15).

The next day, September 12, 1945 (R. 68), Swartz testified that he had forgotten about Winick's written contract when he signed the answers to the interrogatories (R. 81—Q. 42). Following this new explanation, defense counsel offered a written motion (R. 22) to amend answer #6 by striking out the word "oral" and substituting in its place the words "in

writing" (R. 82—Q. 44). The District Court denied this motion, and again excluded Winick's written contract (R. 83), and in doing so the District Court said:

> "This witness testified yesterday he knew at the time he answered them there was a written contract, but that he may have advised you improperly that it was oral. On the face of that, I cannot allow it" (R. 83).

Again the District Court said:

> "He repeated it twice. No. I am not going to allow it" (R. 83).

Thereafter, Hyman Gneses, Respondent's treasurer testified (R. 112), that he had signed Winick's contract in behalf of Respondent (R. 112—Q. 7). Respondent then offered Winick's contract again in evidence and the District Court allowed it (R. 112, 113—Q. 10). Petitioner objected. Then came the following colloquy (R. 113):

> "Mr. Proctor: I offer it.
>
> Mr. Goldman: I object.
>
> Mr. Proctor: Your Honor, this man is equally interested in the London Coat of Boston with Mr. Swartz. He was not in the State at the time the answers to interrogatories were drafted. He was the one who personally knew about this.
>
> The Court: Whom were the interrogatories addressed to, the defendant, or Swartz?
>
> Mr. Proctor: They were addressed, I think to Mr. Swartz.
>
> Mr. Goldman: As president, Mr. Swartz as president, your Honor.
>
> (Interrogatories are handed to the Court)

The Court: I will allow it now.

Mr. Goldman: Your Honor will note my exception.

Mr. Proctor: I offer it. May it be marked Exhibit C, inasmuch as it has that letter? (Contract with Milton Winick previously marked C for identification is now marked Defendant's Exhibit C)" (R. 113).

Mr. Gneses testified that he knew of Petitioner's claim in December 1944 or January 1945 and that he had referred the matter to his lawyer (R. 118—Q. 64, 65).

Petitioner seasonably filed requests for rulings (R. 139; R. 25). These requests for rulings were not acted upon by the District Court.

District Court's Opinion.

The District Court entered judgment for the defendant with costs on September 25, 1945 (R. 28). The District Court's opinion is reported in 62 F. S. 371. See also (R. 28).

Opinion of the Circuit Court of Appeals.

The opinion of the Circuit Court of Appeals is dated July 24, 1946 (R. 163). In the opinion of the Circuit Court of Appeals, the judgment of the District Court was reversed insofar as it awarded costs, and in all other respects, it was affirmed.

Petition for Rehearing and Motion to Remand.

Following the judgment of the Circuit Court of Appeals, Petitioner, seasonally filed a petition for rehearing and motion to remand based upon newly discovered evidence (R. 166) which was denied September 4, 1946 (R. 173).

It is pointed out in this petition for rehearing that there is a substantial variance between the opinions of the District

Court and the Circuit Court of Appeals in the interpretation of the Act and as to the rule of law applicable to this case. This variance is one of the Petitioner's reasons for the granting of this writ (~~*infra*, p. 28~~ *see below*).

Reasons for Granting the Writ.

The questions which this case presents are raised for the first time under the Selective Training and Service Act of 1940, as amended. They are important questions of federal law of wide general interest, especially to the government and to the veterans of World War II. Indeed, the questions herein raised vitally affect our national defense, the welfare and honor of our government and of the men and women, perhaps millions, who served her in a grave hour of national peril. These questions involve a matter of broad public policy, that is, can a veteran be deprived of his reemployment rights under the Act to a position held under a written contract, by oral testimony tending to vary that written contract. The rulings and the opinion of the District Court and the opinion of the Circuit Court of Appeals probably misapprehend the intent of Congress under the Act. And, although the Circuit Court of Appeals affirmed the judgment of the District Court, nevertheless, there is a substantial variance between the two opinions as to the interpretation of the Act and as to the proper rule of law applicable to this case. This variance is pointed out in the petition for rehearing (R. 167-169). There is also an apparent conflict between the opinions of the District Court (R. 28), and of the Circuit Court of Appeals (R. 163), on the one hand, and the rules of the Selective Service (*supra*, p. 6) on the other hand in the interpretation of the words "position, other than a temporary position" as used in the Act and in determining whether a military substitute's position is a temporary position.

Wherefore, your Petitioner respectfully prays that this petition for a Writ of Certiorari be granted; that the judgment of the District Court and of the Circuit Court of Appeals (except as to costs) be reversed; that judgment be entered for the Petitioner and the case be remanded to the District Court for assessment of damages or that in the alternative a new trial be granted.

Respectfully submitted,

MAURICE PALAIS,
Attorney for Petitioner.

MEYER H. GOLDMAN,
Of Counsel.

Brief in Support of Petition.

Opinions Below.

The opinions of the District Court (R. 28) and of the Circuit Court of Appeals (R. 163) are referred to in the Petition (*supra*, p. ~~19~~ 18).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

Questions Presented.

The questions presented in this case are stated in the Petition (*supra*, pp. 2-4).

Statutes Involved.

The statute involved in this case is the Selective Training and Service Act of 1940, as amended, as set forth in the Petition (*supra*, pp. 4-6).

Statement of Case.

The statement of the case is given in the Petition (*supra*, pp. ~~7-20~~ 7-18).

Specification of Errors to Be Urged.

These are indicated generally in the Petition under the heading "Questions Presented" (*supra*, pp. 2-4) and in the "Argument" in this brief.

Argument.

I. Under the terms of his written contract of employment, the Petitioner held a position that was "other than a temporary position", within the meaning of the Act. The primary issue in this case is the interpretation of that written contract rather than the veracity of witnesses. Hence, the general rule that the findings of a lower court will not be overruled unless plainly wrong because it has seen and heard the witness, is not applicable to this case.

Paragraph 4 of Petitioner's contract gives to Salzman the territory of New York City and then it adds the territory of Philadelphia, Washington and Baltimore "providing he covers them actively to the satisfaction" of the respondent (Petition, *supra*, p. 10). The quoted words must be deemed to qualify the entire contract and must apply to all of Salzman's territory or at least to part of it. Without territory Salzman could really have no employment. Therefore, the duration of Salzman's employment depended in whole or in

part upon his satisfactory performance. Salzman testified in substance that according to the general usage in the trade the duration of his employment depended upon satisfactory performance (R. 39, 40, Q. 7, 8). Employment that depends upon the satisfactory performance of the employee is not terminable at the will of the employer. *Kirklye* v. *Roberts Company,* 268 Mass. 246, 252.

At any rate the Petitioner's contract was at least one that was terminable at the will of either party. That fact, however, did not make the plaintiff's employment a "temporary position" within the meaning of Section 308 (b) of the Act.

The veteran's employment was terminable at will in *Kay* v. *General Cable Corp.,* 144 Fed. 2d. 653, 655, and yet the veteran was held entitled to recover. The Court can take judicial notice of the fact that under our economic system, most people, who are gainfully employed, work under contracts that are terminable at the will of the employer and the employee. Hence, the Act would be of practically no use to veterans if it excluded from its protection veterans in that class of employment.

The written contract should be conclusive as to what the parties agreed to. In fact paragraph 8 of the contract itself said so (Petition, *supra,* p. 10). The contract makes no reference to any temporary position or that Salzman was a military substitute for Milton Winick.

II. Whether Petitioner's position was "other than a temporary position", within the meaning of the Act, depended solely and exclusively upon his written contract of employment, and evidence outside of that contract could not be considered on that question. To hold otherwise would defeat the intent and spirit of the Act and of Congress, would open the gates to sham defences based upon matters that were not in writing, would violate the parol evidence rule and the express terms of the contract which specifically says

that its construction and interpretation shall be governed by the Laws of Massachusetts and that it "constitutes and expresses the whole agreement of the parties with reference to employment and compensation and that no change * * * shall be claimed or recognized unless evidenced by a writing signed by the party to be charged thereby (Petition, *supra*, p. 10).

The parol evidence rule is a rule of substantive law and not merely a rule of evidence.

> *Goldenberg* v. *Tagliano*, 218 Mass. 357, 359;
> *Goldband* v. *Allen*, 245 Mass. 143, 150.

The plaintiff's written contract makes no mention of Milton Winick; it does not say a word about any "temporary position"; it does not say that the plaintiff was taking any one's place. And this contract was prepared by the defendants' lawyer (R. 40—Q. 9; R. 121—XQ. 90).

Under his written contract the duration of the Petitioner's employment depended either upon his satisfactory performance or at least upon the will of either party. The injection of Winick at the trial changed this written agreement of the parties, and made the duration of the plaintiff's employment dependent upon the act of Winick returning from military service. In this sense there is an inherent contradiction in the opinion of the Circuit Court of Appeals (and of the District Court too), when it said on the one hand that the Petitioner's employment was terminable at the will of either party, and, on the other hand that "the District Court found, on sufficient evidence, that the position was temporary, pending return from military service of one Winick". There is a substantial difference between employment the duration of which depends upon the will of either the employer or the employee and one whose duration depends upon the act of a third party. In the latter case both the em-

ployer and the employee are deprived of any choice in the matter and of any freedom of will which is implicit in a contract that is terminable at the will of either party.

III. For the foregoing reasons and for the following additional reasons, the evidence relating to Winick was incompetent and improperly admitted, because,

A. Winick did not intervene and was not a party to this action. Hence, his status could not affect Petitioner and was not material to any issue in this case.

In the case of *Abraham Fishgold* v. *Sullivan Dry Dock & Repair Corporation,* decided by the Supreme Court, May 27, 1946, 66 Supreme Court Reporter, p. 1105, 14 Law Week 4364, the labor union intervened and therefore had a standing in the proceedings.

B. When Winick entered the service in May 1942, he held no position with the Respondent within the meaning of the Act, but rather, he was an independent contractor and, as such, he was not entitled to any rights or benefits under the Act. Hence, his status could not affect the rights of Petitioner.

There was no credible evidence, and the respondent nowhere alleged in its pleadings, that Milton Winick was an employee or a person who, within the meaning of the Act was entitled to the benefits of the Act. An independent contractor is not entitled to the benefits of the Act. *Kay* v. *General Cable Corp.,* 144 Federal Second 653, 654. The fact that Winick's partnership certificate was still on file (Petition, *supra,* pp. 12 to 13), showing that he was operating an independent sales agency, coupled with the fact that there was no evidence that Winick was on respondent's books as an employee was conclusive proof that Winick was not an employee.

The newly discovered evidence referred to in the Petition, *supra,* page 19, shows conclusively that, according to the books and records of the Respondent, Winick was not considered an employee by the Respondent during the years in question.

C. The jobs of Petitioner and of Winick, under their respective written contracts, were different as a matter of law. Hence, there could not be any question of Petitioner being a substitute or a temporary substitute for Winick.

Under paragraph 4 of his contract, the Petitioner had the territory of New York City, Philadelphia, Washington and Baltimore (R. 140, 141). On the other hand Winick only had the territory of New York City under paragraph 4 of his alleged contract (R. 154). Also Winick was subject to split commissions under his contract whereas there is no mention of this matter in the Petitioner's contract. These two variances can well explain why the Petitioner's commissions averaged a thousand dollars a month (R. 44—Q. 37), while Winick's commissions, with two or three exceptions, never exceeded two hundred dollars a month (R. 67—XQ. 62-69).

D. On all the evidence, the jobs of Petitioner and of Winick were different. Hence, there could not be any question of Petitioner being a substitute or a temporary substitute for Winick.

Although hundreds of letters were exchanged between the Petitioner and Respondent, in no instance was Winick ever mentioned (Petition, *supra,* p. 13). One month before Winick's discharge from the army and at the time that the Petitioner was about to be inducted into the army the Respondent in writing gave to the Petitioner certain assurances about the job and there was no mention of Winick (Petition, *supra,* p. 14). Under the Soldiers' and Sailors' Civil Relief Act of 1940, somewhat similar assurances were considered as a "solemn obligation" by the Court in the case of *A. E. Stock-*

ton v. *Ford Motor Company,* 61 F. S. 261, 263. Other facts conclusive on this point are stated in the Petition, *supra,* pages 14 and 15.

E. Even if he ever had any rights under the Act, Winick had waived them by voluntarily accepting a position with Respondent at a salary of $60.00 a week where formerly he allegedly worked on a commission basis with the possibilities of earning as much as the Petitioner, namely, about $1,000.00 a month. The salary position was not of "like seniority, status and pay", within the meaning of those words in the Act, as his former position. If Winick waived his rights under the Act, his status could not be an issue in this case.

It has been held that an employee can waive his rights under the Act, *Wright* v. *Weaver Bros., Inc.,* of Maryland, 56 F. Supp. 595.

F. When Petitioner applied for reemployment on November 20, 1944, Winick had already been working for Respondent since September 1943, that is for a period of more than twelve months. Under the Act, the employer's obligation to the veteran ends after twelve months of reemployment. Section 308 (c), Petition, *supra,* page 5. Hence, Winick, having been on the job for more than twelve months, had no rights under the Act. For that reason, Winick's status could not affect Petitioner's claim.

In fact and in law at the time that the Petitioner applied for reemployment the status of Winick was that of a civilian without any rights under the Act.

The plaintiff submits that the Act and this "one year" limitation was intended by Congress to serve two purposes: (a) to give the returning veteran an opportunity for at least one year to adjust himself to civilian life without the accompanying pressure of economic distress, *Kay* v. *General Cable Corporation,* 59 F. Supp. 358, 360; and (b) to rotate jobs wher-

ever possible and within reasonable limits so as to spread that opportunity as widely as possible and thus to give succeeding returning veterans also a chance at rehabilitation where the same job was claimed by more than one person.

Congress could not have been unaware of the fact that because of war conditions there would be many such instances where the same job was claimed by more than one person. And Congress knew that if it protected only the first man on the job it would take the risk of offending the replacement, that is the second man who in the absence of some measure of security for himself might well disdain such employment. Vacancies would be difficult to fill under such circumstances and the war effort would suffer. Hence the need for an equitable adjustment by rotating jobs.

The foregoing interpretation of the Act is confirmed by implication in the rules of the Selective Service covering military substitutes and temporary employment, referred to in the Petition, *supra,* page 6. It is also confirmed by the statement of the Court in the case of *Anderson* v. *Schouweiler*, 63 Federal Supplement 802, 807-808, as follows:

> "It is stated by the Secretary of War and the Secretary of the Navy that there will be sixteen million men and women returned to civilian life from the service in the armed forces of the United States. They have been assured by Congress that they will be returned to the positions they occupied in civilian life".

Surely some of the sixteen million men and women must have been military substitutes in civilian life and yet the Court in the *Anderson* case thought that all of the sixteen million men and women were entitled to the benefits of the Act.

G. Respondent waived its rights under the Act and cannot defend this action on the grounds that Petitioner's job was temporary and that Winick had a prior right to the

job because, Respondent voluntarily assumed a clear obligation to Petitioner under a written contract of employment, with full knowledge of its alleged obligations to Winick and without expressly reserving its rights as to Winick. Hence, Respondent is now legally estopped from raising the issue of Winick and the evidence relating to Winick was incompetent.

The Act in question was examined by the Supreme Court in the case of *Abraham Fishgold* v. *Sullivan Dry Dock & Repair Corporation,* decided May 27, 1946; 66 Supreme Court Reporter, page 1105; 14 Law Week, 4364. In that case the Supreme Court said (Law Week, at p. 4365); (Supreme Court Reporter at p. 1111):

> "This Legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need * * *"
>
> "And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act."

The plaintiff was employed under a written contract of employment (R. 38, 39—Q. 4, 5; Plaintiff's Exhibit 1—R. 140). This contract was drawn by the defendant's attorney (R. 40—Q. 9; R. 121—XQ. 90). It was executed July 28, 1942 (R. 40). The plainitff was initially employed a month previous, in June 1942, under an oral arrangement (see paragraph 4 of complant—R. 2 and the defendant's admission in paragraph 4 of its answer—R. 7). Thus, the written contract was executed long after all discussions were had on the terms of employment. Mr. Gneses, under cross examination, testified that when he asked his lawyer to draw Salzman's contract, he told the lawyer everything about the talks that were had with Salzman in New York (R. 121—

XQ. 90 through XQ. 93). Since Salzman's contract omits any reference to a temporary job or to Winick, we must draw one of two conclusions: Either there were no talks in New York about Salzman taking Winick's job or a job on a temporary basis, or else that, despite such talks, the defendant voluntarily assumed obligations to Salzman with full knowledge of such talks. Thus, both parties had agreed that Salzman's job was not a temporary one. In either case, Respondent's alleged obligations to Winick and the testimony about Winick were incompetent.

To paraphrase the quoted language of the *Fishgold* case *supra*, page ~~30~~ 28, the Petitioner respectfully submits that "no practice of employers or agreements between employers" and Winick "can cut down the service adjustment benefits which Congress has secured" Salzman "under the Act".

As stated earlier in this brief it has been held that the employee can waive his rights under the Act (*Wright* v. *Weaver Bros., Inc. of Maryland, supra*, p. ~~27~~ 26). The employer must have the same right as the employee to waive rights under the Act.

IV. As a matter of law, Winick's written contract of employment, the facts concerning which are covered in the Petition, *supra*, pages 16, 17, 18, should have been excluded for the reasons already given above and for the additional reason that we have here the admitted perjury of the Respondent's president who testified at the trial that he knew of Winick's written contract when he stated, under oath, in answers to Petitioner's interrogatories that Winick's contract was oral. (Petition, *supra*, pp. 16-18.)

It should be noted that although Mr. Gneses was on the witness stand and could easily speak for himself, it was his counsel Mr. Proctor and not the witness, who said that Gneses was not in the State when the answers were drafted (R. 113). Nothing was said as to where Gneses was when the answers were signed, or when the interrogatories were discussed by the Respondent's officers and counsel.

Gneses knew of the plaintiff's claim in December 1944 or January 1945. He had referred the claim to his lawyer (R. 118—Gneses XQ. 64, 65). Surely, Gneses must have been fully informed of every legal move made by the plaintiff. Therefore, even if true, the fact that Gneses was not in the State at the particular time when the answers were drafted was not a valid reason for the District Court to admit the contract in evidence.

Four times, the District Court excluded the written contract with Winick. In doing so, the District Court remarked twice that Swartz had testified that he knew of this written contract when he signed the answers under oath stating that it was oral. (See Petition, *supra,* pp. 16, 17, 18.) Thus, not only did Swartz admit to perjury, but the District Court's ruling and remarks were a judicial confirmation of Swartz's confession of perjury. The District Court's ruling was the law of the case; it was in effect a ruling that Swartz had deliberately lied.

The interrogatories were not addressed to Swartz personally; they were addressed to the corporation but were to be answered under oath by its president, Swartz. The latter fact, however, did not relieve the corporation from its responsibility, and no distinction can be drawn between the acts of Swartz and the acts of Gneses.

Harrington v. *Boston Elevated Railway Company,* 214 Mass. 563, 567.

See:

Holler v. *General Motors Corp'n,* 3 F. R. D. 296, 298.

There are analogies in the law where perjury, or unclean hands, or the making of false statements and the concealing of facts, or estoppel, have deprived an offending party of relief in the courts as a matter of law.

(a).—*Matter of Keenan,* 314 Mass. 544, 551. (Lawyer disbarred for jury fixing—denied re-instatement.)

(b).—*Navison Shoe Co.* v. *Lane Shoe Co.,* 36 F. (2) 454, 459; (paragraph 6). (False statement made in a complaint to confer jurisdiction upon the Federal Court deprived complainant of relief. See also—*Zearfoss* v. *Zearfoss,* 122 N. J. Eq. 530; 164 A. 893; *Meyer* v. *Blacker,* 184 A. 191, 195 (N. J. Eq.)) ("Where a party in litigation knowingly makes false statements as a basis for relief, he should be denied relief".)

(c).—*4 Wigmore on Evidence* (3rd Ed.) Sec. 1210 (1), Page 381; *Gage* v. *Campbell,* 131 Mass. 556, 570. (Failure to produce demanded document deprives offending party from offering it at trial); *6 Wigmore on Evidence* (3rd Ed.) Section 1859 (e) Page 472); *4 Wigmore on Evidence* (3rd Ed.) Section 1210 (2), Pages 381-2; Cf. Rules 34 and 37 of Federal Rules.

(d).—*Bergeron* v. *Mansour,* 152 F. (2) 27. (Offending party held to be estopped from asserting his rights because of fraud and unfairness.)

The consequences of the defendant's perjury in denying the existence of a written contract with Winick is self-evident. The plaintiff was entirely misled as to the existence of such a document and, therefore, had no way of preparing for the introduction of that document at the trial. He would have had the right before trial to inspect that document under Rule 34 or to file "Admission of facts and of genuineness of documents" under Rule 36. He would, in that way, have been entitled to test the authenticity of that document. In this connection, too, it should be noted that Rule 36, providing for admission of facts and of the genuineness of documents, makes the failure to deny the existence of the documents and absolute admission and such admission cannot be contradicted at the trial.

The issue under this point does not involve the question of whether a party is bound by his answers to interrogatories, or the consequence of an erroneous answer, or an answer made through inadvertence; neither does it involve the question of the right and of the discretion of a trial court to believe or to disbelieve contradictory statements of a witness. Therefore, the cases cited by the respondent in this connection are not in point. This case, on the contrary, involves the question of the consequences of the respondent's deliberate fraud and falsehood.

V. The District Court erred in denying Petitioner's request for rulings referred to in the Petition, *supra*, page 18.

The District Court accepted the plaintiff's request for rulings (R. 139). The plaintiff submits that the District Court, having accepted these requests for rulings, should have acted on them. Its failure to do so must be construed as a denial of them.

> *Sullivan* v. *Roche*, 257 Mass. 166, 169;
> *Hetherington* v. *Firth*, 210 Mass. 8, 17, 18.

Requests for rulings have standing in the Federal Courts under Rule 46 of the Federal Rules of Civil Procedure, especially where the trial court has not made any rulings of law under Rule 52(a) on important points raised by the plaintiff.

The Petitioner's requests for rulings were in harmony with the Supreme Court's liberal construction of the Act in favor of the veteran, in the case of

> *Abraham Fishgold* v. *Sullivan Drydock and Repair Corp'n.*, 14 Law Week, 4364, 4365.

(Decided by United States Supreme Court May 27, 1946. 66 Supreme Court Reporter, p. 1105, 1111.)

VI. For the reasons already given above, the District Court was not warranted in finding that Petitioner had a temporary position, and for the further reason that the Respondent did not specifically plead that it was excused from re-employing the Petitioner on any alleged ground that the Petitioner's position was a temporary position, or that it was a temporary position pending Winick's return from the Service. (See Respondent's pleadings, Petition, *supra*, p. 8.)

Although the District Court ruled that the Respondent had but one sales representative in New York, and that this was a case of two men claiming one position, the District Court completely overlooked the fact that on the Respondent's own testimony several salesmen covered the same cities, although not necessarily from the same office. (R. 84—Q. 51; R. 86—Q. 56; R. 90—Q. 78; R. 94—top of page; R. 96—XQ. 119; R. 132—Q. 52; R. 132, 133—XQ. 53, 54.)

The foregoing references to the record clearly show that a Mr. Feigenbaum was handling Petitioner's territory in Baltimore, Philadelphia and Washington at the very time that Petitioner requested reinstatement. There was no evidence that Feigenbaum was a veteran and entitled to priority over Petitioner.

VII. Petitioner was deprived of a jury trial. He seasonably claimed one and then waived it conditionally.

This point involves two questions: (A) Did the plaintiff have a right to a jury trial? (B) If the plaintiff had a right to a trial by jury, did he waive it unconditionally?

(A) The Plaintiff Had a Right to a Trial by Jury.

(1) The argument is untenable that the plaintiff was not entitled to a jury trial because his claim was statutory, was unknown to the common law and was not, therefore, secured by the 7th Amendment to the Constitution of the

United States, or by Rule 38 of the Federal Rules of Civil Procedure, 28 U. S. C. Section 723—c. The War Risk Insurance Act of 1917 did not provide for a jury trial and yet the United States Supreme Court had held that a claimant who sues under that Act was entitled to a jury trial.

Law v. *United States,* 266 U. S. 494;
Hacker v. *United States,* 16 F. (2d) 702.

See:

Galloway v. *United States,* 319 U. S. 372, 388-389; footnote 18 on page 389.

(2) There are cases under the Labor Relations Act which hold that in the absence of an enabling statute a jury trial may not be had.

Labor Board v. *Jones & Laughlin,* 301 U. S. 1, 48-49;
Agwilines Inc. v. *National Labor Relations Board,* 87 F. (2d) 146, 150.

But those cases point out two distinguishing features of the Labor Relations Act: (1) that it was an Act essentially penal in character to enforce a public policy, rather than intended for the benefit of a particular employee; (2) that the right to recover damages or back pay was merely an incident of the employee's restoration to his job under a Court order or an order of the Labor Board.

In the case at bar the Act reflects a general public policy to help veterans; but it is also intended to help the particular veteran in a financial way. And it has been held that the veteran's right to recover damages or back pay is not an incident of, nor dependent upon, the power and the exercise of that power, of the District Court to restore the veteran to his former position.

Hall v. *Union Light Heat & Power Co.*, 53 Fed. Supp. 817, 818.

In an action brought under the Lever Act, Justice Brandeis held that the right to a jury trial is an incident of the jurisdiction of the District Court, even in the absence of an enabling statute.

United States v. *Pfitsch*, 256 U. S. 547.

Under Section 311 of the Selective Training and Service Act of 1940, there are serious penalities for its violation for both the inductee and the employer, and in both cases a jury trial has been taken for granted even though there is no enabling statute.

United States v. *Daily*, 139 F. (2d) 7;
Zilkanich v. *United States*, 139 F. (2d) 1016.

Shall the offenders have a greater right to a jury trial than the man who served his country?

(3) From a practical standpoint the case at bar was one involving the question of damages only, and hence the argument in favor of a jury trial is even stronger. The case was not reached for trial until 10 months after the plaintiff's request for reemployment. Had he been promptly reinstated, his term of employment would have expired within 2 months of the District Court's decision. Under such circumstances, damages, rather than an order for restoration, was the only practical solution.

(B) The Plaintiff's Jury Waiver Was Qualified.

The plaintiff's initial claim for a jury trial (R. 6) was followed by the defendant's motion to strike it out (R. 10). The latter motion was heard together (R. 11) with the plain-

tiff's motion (R. 10) for a speedy trial. The Act provides for such a speedy trial. The docket entry (R. 11) implies that a speedy trial was ordered, on a condition, "jury trial having been waived" (R. 11). But the plaintiff got his trial 7 months later which is not the speedy trial intended by the Act (Section 308 (e), *supra*, pp. 3, 4). In view of the delay in assigning this case for trial, the plaintiff filed a motion on August 14, 1945 to reclaim his jury trial (R. 18). This motion was denied (R. 21). The plaintiff renewed his request for a trial by jury when his case went to trial (R. 32). This request was denied (R. 33).

The plaintiff submits that his waiver was conditional and that he should have been permitted to reclaim his jury trial.

VIII. The Circuit Court of Appeals erred in denying Petitioner's Petition for rehearing and motion to remand based upon newly discovered evidence for the reasons stated in said Petition and motion. The arguments on this point are stated in the petition for rehearing (R. 167-172).

CONCLUSION.

For the reasons stated in the Petition for Writ of Certiorari and in the supporting brief, Certiorari should be granted; the judgments of the Circuit Court of Appeals, except that portion of it that deals with costs, and of the District Court should be reversed; judgment should be entered for the Petitioner and the case be remanded to the District Court for assessment of damages; or in the alternative the case should be remanded to the District Court for a new trial.

Respectfully submitted,

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